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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

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Clerk.

Nos. 580-589.

THE UNITED STATES, LIBELANT, APPELLANT, ET AL.

v.

THE PODER DE DIOS; JULIAN BENGOCHEA ET AL., CLAIMANTS, APPELLEES, ET AL.

[AND NINE OTHER CASES.]

BRIEF FOR APPELLEES.

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OCTOBER TERM, 1902.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE PODER DE DIOS;
JULIAN BENGOCHEA ET AL., *Claimants, Appellees.* — No. 580.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE ANTONIO Y PACO;
ANGEL LOPEZ ET AL., *Claimants, Appellees.* — No. 581.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE ENGRACIA;
FRANCISCO GONZALES ET AL., *Claimants, Appellees.* — No. 582.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE SEVERITO;
DOMINGO TROCHA ET AL., *Claimants, Appellees.* — No. 583.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE ANTONIO SUAREZ;
VILAR ET AL., *Claimants, Appellees.* — No. 584.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE FERNANDITO;
DOMINGO TROCHA ET AL., *Claimants, Appellees.* — No. 585.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE ORIENTE;
MANUEL CARILLO, *Claimant, Appellee.*
No. 586.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE ESPAÑA;
SANTIAGO DUES, *Claimant, Appellee.*
No. 587.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE CUATRO DE SETIEMBRE;
LEONARDO BUNUEL, *Claimant, Appellee.*
No. 588.

THE UNITED STATES, *Libelant, Appellant,*
v.
THE SANTIAGO APOSTOL;
CÆSAR DE LA TORRE, *Claimant, Appellee.*
No. 589.

BRIEF FOR THE APPELLEES.

These are appeals from the final decrees of the district court for the southern district of Florida, awarding damages to the claimants of the above-named vessels. The cases are similar in all respects to those of the Paquete Habana and the Lola. At the suggestion of the appellant, the records have been abbreviated by omitting all the formal parts which are common to these cases and to those of the Paquete Habana and the Lola, on the agreement, however, that as to the parts of the record omitted counsel are at liberty to refer to identical or similar portions of the records in those cases.

The assignments of error are alike in all the cases. The

exceptions to the commissioner's reports are set forth in the Paquete Habana Record, p. 59, and were entitled in all the cases.

The abridged records in the above-entitled cases contain all the proofs offered by the claimants in each case and extracts from so much of the testimony of the witnesses for the Government as relate to that case. The complete depositions of all the Government witnesses are printed in the Paquete Habana Record, pp. 32–53. Under the stipulation abbreviating the record, counsel for either party have leave to refer to such parts of the testimony of the Government witnesses in the Paquete Habana record as are not printed in the separate records in these cases in respect of any matter omitted in the separate records.

Reference will be made in this brief to the Paquete Habana record, in pursuance of the stipulation, touching such parts of the complete depositions as may be considered material, as the several cases are separately discussed, mainly with a view of showing the lack of qualification of the Government witnesses to speak as experts in relation to the value of fishing-smack property.

The commissioner's reports in the several cases are printed in the abbreviated records. The commissioner's opinion, which is entitled in all the cases, is not reprinted in the several abbreviated records, but appears at length in the Paquete Habana Record at pages 55–58.

ARGUMENT.

The same questions that have been argued in the Paquete Habana and the Lola are raised by the Government in these cases, viz:

1. As to the measure and quantum of damages.

2. The responsibility for the damages as between the Government and the captors.

The claimants do not conceive it to be necessary to re-argue at length in this brief the matters of principle which have been fully dealt with in the brief in Paquete Habana and the Lola.

The proceedings have been identical in all the cases.

It was stipulated in these cases, as in the *Paquete Habana*, page 22: "That the proceeds of sale of the above-named vessel, together with the proceeds of sale of any of her cargo, be restored to the claimants, with compensatory damages and with costs;" and "that such damages and costs shall be charged against the United States or the naval captors, or apportioned between the United States and the naval captors, as to justice may appertain and as the legal responsibility therefor may appear; and that either party shall have the right to review the decree * * * on the question of the amount of damages; * * * and the

United States or naval captors or the claimants shall have the right to review such decree on the question whether the ultimate legal responsibility for such costs and damages rests upon the United States or the naval captors."

The assessment of damages, by consent of the parties, was referred to Eugene O. Locke, United States commissioner. The recital of these agreements appears, in each case, at the beginning of the final decrees, (*e. g.*, *The Poder de Dios*, *Rec.*, p. 11).

In every case the exceptions to the report of the commissioner were overruled, and his report was confirmed. No costs were asked for or awarded, but the commissioner's fee in each case was included in the final decree, and by inadvertence is called costs.

The claimants ask leave to refer to the argument on the principal points in the Paquete Habana brief as follows:

1. The claimants are entitled to compensation for the value of the property taken at the place and time of the capture (*Paquete Brief*, pp. 11, 30–41).

2. The consent reference to Mr. Locke, whose special acquaintance with the conditions affecting the value of the property entitles his decision in the several cases, affirmed as it was by the court below, to the greatest possible weight, if, under the circumstances, it is not to be taken as conclusive on the question of the amount of

damages (*Paquete Brief*, pp. 11–15; *The Grace Girdler*, 7 Wall., 196, 204; *U. S. v. Officers, &c., of the Mangrove*, decided February 23, 1903).

3. The exceptions to the report are insufficient to raise the questions attempted to be discussed under the first, second, and third assignments of error (*Paquete Rec.*, p. 66; *Paquete Brief*, pp. 28–30).

4. If the questions sought to be raised by these assignments of error are open in this court, then in each case the report is supported by the proofs and no reversible error has been established.

In this connection the claimants urge the want of qualification of Mr. Horr and the Key West witnesses, and emphasize the fact that their evidence relates only to the value of the vessels in that place, where there was no demand or business for them, and that they speak of a time long subsequent to the capture (*Paquete Brief*, pp. 30–41).

5. No question of interest or costs has been raised here by the exceptions to the commissioner's report or by the assignment of errors (*Paquete Brief*, pp. 40–43).

6. The district judge correctly ruled that the damages were payable by the United States (*Paquete Brief*, pp. 40–77). Under the Prize Acts, the ratification of the captures by the Government, which founded libels thereon, may well

be taken as relieving the naval captors from liability, even if they had been before the court as parties (*Lamar v. Browne*, 92 U. S., 187).

The facts in relation to the different vessels will now be examined. It may be observed that there is some diversity in the statements of the different witnesses with regard to the tonnage of the vessels. The statements contained in the Supplemental Stipulation of Facts are those taken down by the prize commissioner from the crew of the vessel at the time of the capture. Some of them are obviously incorrect. In this brief the tonnages given are those stated by the owners and by the harbor master of the port of Havana, which are probably more nearly correct.

1. THE PODER DE DIOS, No. 580.

This vessel was purchased by Julian Bengochea and Francisco Gonzales in 1896 for $4,000 cash, Spanish gold. The original bill of sale was produced before the commissioner. The boat was built originally in Nassau, N. P. Her net tonnage was 51 tons. Shortly after her purchase repairs were put upon her to the extent of $2,500, at the ship yard of Ceferino Miranda, in Regla. The value of the vessel at the time of her capture was $6,500, Spanish gold (*Bengochea*, pp. 2, 3, 4). Her usual earnings were about 20 per cent. on the capital invested in her (*Id.*, p. 2).

JUAN LLURIA, ship-builder and harbor master, testified that it was his duty, by virtue of his office, to inspect, examine, and value the vessel, and to inspect all repairs that were made to her in Havana. He said: "I have inspected and valued the fishing smack Poder de Dios to be worth, on the 1st of March, 1898, $6,500, Spanish gold, being my appraisement of said vessel upon her special conditions, and my constant inspection of vessels of her class" (p. 4). He annexed his certificate to the same effect, in which he certified that the body of the vessel, her rigging, sails, gearing, ballast, capstan, anchors and chains, galley, caboose, and outfit, sailing compass, lanterns and side lights, and other appurtenances, and one boat with equipments, were all in good condition (p. 5).

GANDON and SUAREZ testified that the value of fresh fish in Havana at the time of the capture was $10, Spanish silver, a quintal (pp. 5, 6).

The foregoing depositions were taken in August, 1900.

The Government has produced no evidence of the value of this vessel in Cuba at the time of her capture.

At the final hearing, in August, 1901, the United States attorney examined Mr. Horr, the marshal of the district, and after final hearing he took and submitted to the commissioner the depositions of Mr. Cash and Mr. Curry, of Key West.

Mr. HORR, whose evidence was received subject to the claimants' objection that he was not qualified to speak as

an expert witness, expressed the opinion that the value of the vessel was $2,500 in Key West. He stated that he did not recollect the exact condition of the boat (*Horr*, p. 7).

In respect of his own qualifications as a witness on the subject of values, Mr. Horr, in speaking of one of the other smacks, said: "She is a fishing smack and *a class of vessel that I haven't had anything to do with*" (*Paquete Habana Rec.*, p. 33). He stated in respect of another boat: "I can't possibly place a valuation, on account of not recalling her condition" (*Paquete Rec.*, p. 35). In regard to still another he said: "I hardly think it will be a reliable estimate" (*Lola Rec.*, p. 27). He further said:

"Q. Captain, all of the values that you have given with reference to the different vessels have been values at Key West? A. Yes.

"Q. You do not propose, as I understand it, to speak of values in Havana? A. No, sir; don't know anything other than what I have known them to pay for vessels coming over to Key West" (*Paquete Rec.*, p. 37).

Mr. Horr had had no experience in the building of fishing boats and knew nothing, of his own knowledge, as to the cost of building (*Id.*, p. 38). His hearsay information that they could be built in Key West for $90 a ton was unreliable (*id.*, p. 34), though in that estimate he apparently included nothing but the hull of the vessel (*Id.*, p. 34). This $90 estimate was evidently an inference on his part from his recollection that Mr. Lowe had said that the smack

Emma Lowe, which he built, had cost him $5,000 (*Id.*, p. 37). Mr. Lowe's own evidence shows that the Emma Lowe had cost him $10,000 (*Lowe, Paquete Rec.*, p. 47).

Mr. Horr's estimates and his recollections therefore seem to be erroneous to the extent of about 100 per cent. He did not claim to be an expert on values, and plainly he was not.

The commissioner, in his final decision, rightly sustained the claimants' objections to Mr. Horr's testimony, and disregarded it as that of an unqualified witness (*Paquete Rec.*, p. 56).

Mr. Cash purchased this vessel and another on their sale by the marshal. He admits that at the sale the vessels "brought less than we expected to pay for them, as a matter of speculation, if the fishing business opened to them" (p. 8). He subsequently sold the Poder de Dios for $1,500 (p. 8). It appears from other parts of his testimony that the Poder de Dios was "in a very fair condition" (*Paquete Rec.*, p. 43). He bought the vessel for the purpose of engaging in the fishing business, if that industry should be revived. She was sold a short time afterwards, in his absence, by his partner, Mr. Curry, when it was found that the fishing business would not be revived (*Id.*, p. 44). He does not state the name of the person to whom he sold the vessel, nor when nor where she was sold (*Id.*, p. 44). His partner, Mr. Curry, who sold the vessel, admitted that he was not an authority on the question of her value (*Paquete Rec.*, p. 52). He says that the Poder de Dios was sold for

$1,500, but he supposed she was worth $2,800 (*Poder de Dios Rec.*, p. 9). He does not state when, where, or to whom she was sold. Apart from this transaction, he had never had any experience in buying or selling fishing smacks (*Poder de Dios Rec.*, p. 10).

It is to be observed that neither of these witnesses assumed to express any opinion as to the value of vessels in Cuba at the time of their capture, or at any time.

The commissioner reported the value of this vessel at the time of her capture as $6,500. To this he added the value of the fresh fish, interest, and expenses, making the total award $8,507.30 (*Rec.*, p. 10; *Opinion, Paquete Rec.*, pp. 55–58). The report was confirmed by the court (*P. D. Rec.*, p. 11).

It is submitted that the report is amply supported by the proofs, and that no reversible error in regard to it is shown (*The Grace Girdler*, 7 Wall., 196, 204; *Kimberley v. Arms Co.*, 121 U. S., 512, 524; *Tilghman v. Proctor*, 125 U. S., 136, 149; *The Richmond*, 103 U. S., 540, 543; *The Elton*, 83 Fed., 519, 520).

2. THE ANTONIO Y PACO, No. 581.

This vessel was purchased by the firm of Vilar, Senra & Co., who owned two-thirds, and Angel Lopez, who owned one-third of the boat, from the firm of C. Garcia y Cia, in January, 1896, for the sum of $6,000. After her purchase repairs and improvements were made upon her, and her

carrying capacity was increased by the addition of a new well. The tonnage of the vessel is 42 tons net. The repairs which were made to the vessel were made between October, 1896, and January 1, 1897. After the completion of these repairs and on January 1, 1898, the value of the vessel was $8,250, Spanish gold (*Vilar*, pp. 2, 3, 4). The book accounts of the firm of Vilar & Co., in relation to their two-thirds interest in the vessel from January 1, 1896, showing the capital invested, the repairs, outlays, and proceeds of catch, were produced and annexed to Vilar's deposition (*Antonio Rec.*, pp. 5–9). The average earnings of the vessel were about 18 per cent. per annum, and are shown in the book extracts relating to the two-thirds ownership of Mr. Vilar's firm (*Vilar*, ans. to 3d int., pp. 2, 3; *Statement*, pp. 8, 9).

JUAN LLURIA, ship-builder and harbor master, testified that it was his duty, by virtue of his office, to inspect, examine and value the vessel, and to inspect all repairs that were made to her in Havana. He said: "I have inspected and valued the fishing smack Antonio y Paco to be worth, on March 1, 1898, $9,000 Spanish gold, basing my appraisement of said vessel upon her special condition, and my constant inspection of vessels of her class" (p. 9). He annexes his certificate, in which he certifies that the vessel has a wooden hull, is schooner-rigged; that her rigging is tight and staunch; that her sails and gearing are complete,

with the necessary iron ballast, capstan, two anchors and chains, galley, caboose and outfit, sailing compass, lanterns and side lights and other appurtenances, and one boat, with equipments, all in good condition, all of which he appraises in the sum of $9,000, Spanish gold (p. 10).

GANDON and SUAREZ testified that the fresh fish, at the time of the capture, were of the value of $10, Spanish silver, per quintal (pp. 10, 11).

Mr. HORR, in behalf of the United States, estimated the value of the vessel at $3,500, in the belief that she had formerly been the Emma Lowe (p. 12). This estimate was based on the further assumption, on his part, that the Emma Lowe had originally cost $5,000 (*Paquete Rec.*, p. 37). It is seen from this that he meant to estimate the vessel at $1,500 less than the original cost of the Emma Lowe. The testimony does not show whether she was the vessel which had formerly been called the Emma Lowe or not, though her tonnage, which is stated by Lluria to be 46 tons' burden (p. 10), was but three tons less than that of the Emma Lowe (*Paquete Rec.*, p. 47). The Emma Lowe, however, had cost $10,000 (*Lowe*, *Paquete Rec.*, p. 47). If the basis of Mr. Horr's estimate be corrected to the extent of the error in regard to the cost of the Emma Lowe, and the deduction of $1,500 be made from the real cost price of that vessel, the result would be that his estimate of the value of

the vessel would be $8,500, which is about that given by her owner (*Villar*, p. 2).

The absence of qualifications on the part of Mr. Horr to speak as an expert in relation to the value of fishing-smack property and the ruling of the commissioner thereon have already been referred to (*ante*, p. 9). It is only necessary to mention further that his entire evidence, when originally offered, was duly objected to, and was received subject to the claimant's objection, which was ultimately sustained (*Paquete Rec.*, pp. 36, 37, 56).

Mr. CASH testified that he purchased the vessel at the marshal's sale for $1,910 (p. 12), but that this was less than he expected to pay for her (p. 13). He sold her for $2,900, but he does not state where, when, or to whom she was sold (p. 13).

Mr. CURRY, the other witness examined by the Government in relation to this vessel, also states that the firm of Cash & Curry sold the Antonio y Paco for $2,900, but he estimates that she was worth about $4,000 (p. 14). He adds, however, that he had never had any experience in buying and selling smacks, except on this occasion (p. 14), and he expressly admits that he is not an authority as to the value of such vessels (*Curry*, *Paquete Rec.*, p. 52).

It is to be observed that none of the witnesses examined by the Government assumed to express any opinion as to the value of the vessel in Cuba at the time of the capture or at any time.

The commissioner reported the value of this vessel, at the time of her capture, to have been $8,250, to which he added the value of the fresh fish, interest, and expenses, making in the aggregate $10,003.30 (*Rec.*, p. 15; *Opinion*, *Paquete Rec.*, pp. 55–58). His report was confirmed by the court (*Antonio Rec.*, p. 16).

It is submitted that the report is amply sustained by the proofs and that no reversible error in regard to it is shown. (See cases cited *ante*, p. 11.)

3. THE ENGRACIA, No. 582.

This vessel was purchased by Francisco Gonzales, Pablo Pereda, Manuel Gonzales, and Manuel Granados, each of whom owned a quarter interest in her, in 1894 or 1895 (*Gonzales*, p. 2). Her purchase price was $4,500 gold. Repairs were subsequently made to the vessel, at the ship yard of Ceferino Miranda, on two occasions to the extent of something less than $1,000 each time (p. 2). After the repairs were made and at the time of her capture the vessel was of the value of $5,500, Spanish gold (p. 2).

JUAN LLURIA, ship builder and harbor master of Havana, testified that it was his duty, by virtue of his position, to inspect, examine, and value the vessel and such repairs as were made to her in Havana. He adds: "I have inspected and valued the Spanish fishing smack Engracia to be worth, on March 1, 1898, $5,500, Spanish gold, basing my appraise-

ment of such vessel upon her special conditions, and my constant inspection of vessels of her class" (p. 4). He appends his certificate, in which he states that the vessel is of 42 tons burden, has a wooden hull, is schooner-rigged, rigging tight and staunch, sails and gearing complete, with necessary iron ballast, capstan, two anchors and chains, galley, caboose, and outfit, sailing compass, lanterns and side lights, and other appurtenances and one boat with the equipments, all in good condition, which he appraises in the sum of $5,500, Spanish gold (p. 4).

GANDON and SUAREZ testify that the value of the fresh fish at the time of the capture was $10, Spanish silver, per quintal (pp. 4, 5).

Mr. HORR, the first witness examined on behalf of the United States, declined to express any opinion as to the value of this vessel, on the ground that he did not recall her well enough to do so (p. 7).

Mr. CURRY, whose evidence is printed in the record (p. 7), testifies in relation to a vessel which he calls the "Lola Engracia." It is evident, however, that he is speaking of the Lola, and not of the Engracia, as he states that he paid $800 for the Lola (p. 7), which was the amount realized on the sale of that boat (*Lola Rec.*, p. 17), while the sale price of the Engracia was $1,000 (*Engracia Rec.*, p. 1). The witness who purchased the Engracia at the marshal's sale was John Lowe (*Paquete Rec.*, p. 47). He also describes her as the "Lola Engracia," but states that he paid $1,000 for her,

the amount for which the Engracia was sold. He sold the Engracia subsequently to parties in Havana, whose names are not stated, for $2,000 (*Lowe, Paquete Rec.*, pp. 46, 47). He does not state, however, when the sale was made. He purchased the vessel on speculation, and sold her because there was no business for her in Key West (*Paquete Rec.*, p. 47).

None of the witnesses examined for the Government assumed to be qualified to express any opinion of the value of the vessel in Cuba, at the time of her capture or at any time.

The commissioner reported the value of this vessel, at the time of her capture, to have been $5,500. The total award for the value of the vessel, her fresh fish, and for interest and expenses, was $7,218.08 (p. 10; *Opinion, Paquete Rec.*, pp. 55–58). The report was duly confirmed (*Engracia Rec.*, p. 64).

It is submitted that the report is fully supported by the proofs, and that no reversible error in regard to it is shown. (See cases *ante*, p. 11.)

4. THE SEVERITO, No. 583.

The owners of this vessel at the time of her capture were Domingo Trocha and Modesto Llanuge, each of whom owned a half interest (*Trocha*, p. 2). She was a vessel of 35 or 41 tons burden (*Stip. as to Facts*, p. 2; *Lluria*, p. 5). She

was purchased by Trocha and Llanuge, August 19, 1896, for $3,000 Spanish gold, and repairs were put upon her between October, 1896, and January, 1897, by a master ship-carpenter named Antonio Deus. Her repairs consisted of a complete renovation, new well, planking, rigging, and sails. The repairs cost about $4,000, and the labor and rigging something over $600 additional. Trocha places her valuation at the time of the capture in round numbers at $8,000 (*Trocha*, pp. 2, 3).

LLURIA, who had inspected, examined, and valued the vessel and her repairs, valued her, on March 1, 1898, at $8,000, Spanish gold, including all her tackle, apparel, and furniture, which, he states, were in good condition (pp. 4, 5).

GANDON and SUAREZ testifies that the value of the fresh fish at the time of the capture was $10, Spanish silver, per quintal.

Mr. HORR was unable to express any opinion as to the value of this vessel, but was under the impression that $8,000 was excessive, from her tonnage and her age (p. 7). Mr. Horr, as has already been pointed out (*ante*, p. 9), did not profess to be qualified as an expert on the value of this class of tonnage.

Mr. M. CURRY, who purchased this vessel at the marshal's sale for $1,300, stated that he had no experience in buying or selling smacks, except on this occasion (pp. 7, 8), and that he had never bought or sold sailing vessels

of any class (*Paquete Rec.*, p. 45). His firm sold the Severito for $3,000. Nothing is said as to when, where, or to whom the vessel was sold, and he expressed no opinion as to her real value.

The commissioner found the value of this vessel at the time of the capture to have been $8,000, and his total report for the vessel, fresh fish, interest, and expenses was $9,566.49 (Rec., p. 9; *Opinion, Paquete Rec.*, pp. 55–58). The report was duly confirmed by the court (*Severito Rec.*, pp. 9, 10).

It is submitted that the report is fully justified by the proofs, and that no reversible error in regard to it is shown. (See cases *ante*, p. 11.)

5. THE ANTONIO SUAREZ, No. 584.

This vessel, at the time of her capture, was owned by the firm of Vilar, Senra & Co. (*Vilar*, p. 2). They took over the vessel in January, 1896, on a valuation of $10,000, in the following manner: Vilar, Senra & Co. is the successor of the former firm of C. Garcia & Co., and upon the dissolution and liquidation of the latter firm they took charge of its business as it stood, and assumed its obligations. The Antonio Suarez appeared in the general balance as valued at the sum of $10,000, Spanish gold; was accepted at that price, and so transferred and entered in the books of the new firm. The firm of C. Garcia & Co.

was dissolved and the firm of Vilar, Senra & Co. was constituted with several members, which took over and assumed all the credits and obligations of the old firm, and continued its business under the new style, according to duly recorded articles of copartnership (*Vilar*, pp. 2, 3).

The vessel was of 34.74 tons net (*Vilar*, p. 2) and 42 tons gross burden (*Lluria*, p. 7). No extensive repairs were effected after her purchase by Vilar's firm, but the usual and ordinary maintenance repairs of each trip, as might be required, in rigging, sails, caulking, careening, painting, &c., were made, and appear in the accounts of the vessel's disbursements, which were produced by the witness and marked Exhibit A to his deposition (*Vilar*, p. 4). This exhibit, however, is not printed.

The witness valued the boat when captured at the sum of $10,000, Spanish gold (*Vilar*, p. 2).

LLURIA who inspected, examined, and valued the vessel and her repairs, estimated her value on March 1, 1898, as $9,000, Spanish gold, basing his estimate on her general condition and the condition of her tackle, apparel, and furniture, all of which were good (pp. 6, 7).

GANDON and SUAREZ testified that the value of her fresh fish at the time of her capture was $10, Spanish silver, per quintal (pp. 7, 18).

Mr. HORR stated, subject to the claimant's objection to his qualifications, that in his opinion $3,000 was an outside valuation for the vessel (p. 9). Reference is made to what

has previously been stated on the subject of his qualifications (*ante*, p. 9).

REEDY, who purchased this vessel at the marshal's sale for $1,260 and subsequently sold her for $2,300 because there was no demand for vessels of this character at Key West and she was "eating her head off," and "it was a dead loss to keep her," was of opinion that she was worth as much as the amount for which she was appraised by Lluria (*Reedy*, pp. 9–11). He states that she appeared to be almost new; that her timbers and planks were in first-class condition, and that he was given to understand that she had cost $8,000 before the war. He states that she could not have been built in Key West for that money, and that she was a better and stronger vessel than one for which Mr. Lowe had paid $10,000 (p. 11).

The commissioner found the value of this vessel when captured to have been $9,000, and his total report, including vessel, fresh fish, interest, and expenses, was $10,945 (*Rec.*, p. 11; *Opinion, Paquete Rec.*, pp. 55–58). The report was duly confirmed by the court (*A. Suarez Rec.*, p. 12).

It is submitted that his report is amply supported by the evidence, and that no reversible error in regard to it is shown. (See cases *ante* p. 11.)

6. THE FERNANDITO, No. 585.

This vessel was owned, at the time of her capture, by Domingo Trocha and Modesto Llangue, each of whom owned a half interest. Trocha paid $2,750, Spanish gold, for his half interest in August, 1896. The vessel was small, but had a deep well, with considerable carrying capacity, and consequently earned considerable money (*Trocha*, p. 2). She was of 26 tons burden (*Lluria*, p. 4). Her earnings are estimated to have been from 24 to 28 per cent. on her capital per annum. She had received repairs such as were incident to ordinary maintenance, including painting, replacing cables, sails, parts of rigging, &c. (p. 3). She was worth at the time of her capture $5,500 (*Trocha*, p. 2). Lluria estimated her value on March 1, 1898, to be that amount, and stated that the vessel, her tackle, apparel, and furniture, were all in good condition (p. 2).

GANDON and SUAREZ testified to the value of the fresh fish, as in the other cases.

Mr. HORR stated, subject to objection, that he did not think the vessel was worth the amount at which she was valued, but he did not express any opinion as to her actual value (p. 3). There was no other evidence on the subject.

The commissioner found the value of the vessel at the time of her capture to have been $5,500, and, adding the value of the fresh fish, interest, and expenses, he awarded the claimants the sum of $7,471.94 (p. 7; *Opinion, Paquete*

Rec., pp. 55–58). The report was duly confirmed (*Fernandito Rec.*, p. 8).

It is submitted that the report is fully sustained by the evidence (cases cited *ante*, p. 11).

7. THE ORIENTE, No. 586.

This vessel was owned by Manuel Carillo. He had purchased her in Key West, about twenty-three years prior to the capture, for the sum of $1,000. It cost him about $500 to get her transferred to the Spanish flag. He repaired her at that time to the extent of about $1,000. Two years later he careened her and made extensive repairs, which cost about $5,000. Two years later he careened her again, in the Sama ship yard, and the repairs then cost him about $8,000. It is evident that the vessel had been substantially rebuilt. Although previous to her capture he had been offered $6,000 for the vessel, she had been officially appraised at $5,000, and Carillo gives that sum as her value at the time of the capture (*Carillo*, p. 2). A copy of a deed showing the cancellation of a mortgage for a part of the repairs in August, 1882, was produced (p. 4). The vessel earned net profits of from $250 to $300, silver, monthly (p. 2).

LLURIA states that the value of the vessel, on March 1, 1898, was $5,000, Spanish gold, and that her body, tackle, and furniture were all at that time in good condition (pp. 5, 6).

GANDON and SUAREZ testify to the value of the fresh fish, as in the other cases.

Mr. HORR was unable to place any estimate on the value of this vessel (p. 8).

Mr. ATCHISON states that if the Cuban fish markets had been open to residents of Key West the vessel would have been worth, for fishing purposes, in Key West, about $3,500. With that market closed, he estimated her value at about $2,500 or $3,000 (pp. 8, 9). He states that the condition of the vessel was good (p. 9). Mr. Atchison was deputy United States marshal, and did not claim to possess any qualifications which would entitle him to speak as to the value of the vessel in Cuba at the time of her capture.

The commissioner reported the value of this vessel, at the time of the capture, as $5,000, and, adding the value of the fresh fish, interest, and expenses, awarded in all the sum of $6,827.72 (*Rec.*, p. 10; *Opinion, Paquite Rec.*, pp. 55–58). The report was duly confirmed (*Oriente Rec.*, p. 11).

It is submitted that the report is fully sustained by the evidence, and that no reversible error in regard to it is shown. (See cases *ante*, p. 11.)

8. THE ESPANA, No. 587.

This vessel was owned, at the time of her capture, by Santiago Deus. He had built her in Regla, in 1884, at a cost of $10,000. She has received considerable repairs in the way of a new well, sails, rigging, &c. She was of 51 tons net burden. The cost of the new well and repairs incident to it, which were made seven or eight years before the capture, had been about $1,800. Her value at the time of her capture, in May, 1898, was $9,000 gold (*Deus*, pp. 2, 3). The net earnings of the vessel were from $300 to $350 each trip on gross earnings of from $800 to $900. She averaged about one trip per month. The vessel had been specially built for the fishing business, with a large well, and earned proportionately more than other vessels which had been adapted to that business without having been built specially for it originally (*Deus*, pp. 2, 3).

LLURIA inspected and valued the vessel as worth, on March 1, 1898, $9,000. He states that her body, tackle, apparel, and furniture were all at that time in good condition (p. 4).

GANDON and SUAREZ testified to the value of the fresh fish as in the other cases.

Mr. HORR, over the claimant's objection, estimated her value at about $3,500 (p. 7). Reference is made to what has been previously stated with regard to the qualifications of this witness (*ante*, p. 9).

Mr. CATES, who purchased the vessel for $1,310 at the marshal's sale, states that he "offered to sell it to the owners for $3,500; they would not give that much money" (p. 7). He does not state the names of those to whom he refers as the owners, nor when nor where he made the offer, nor does it appear that he knew who the former owners of the vessel were. Before he resold her he had had her cut down and her tonnage reduced from 58 to 48 tons (p. 9). In this changed condition he says that he sold her to the same owner to whom she had previously belonged (p. 9). Again, there is no statement of the name of the owner or of any knowledge on his part on that subject. The time of the sale is not stated. He sold the vessel because there was no demand or use for her in Key West (p. 9). He expressed no opinion as to her real value, either in Key West or Havana. He had never bought or sold fishing smacks before (p. 9).

Counsel for the Government contends that, in this case, the damages should be taken at the sum for which it is claimed that the vessel was resold, with interest to cover the loss of her use between the time of her capture and the resale, and interest on the amount of the resale from its date to the date of final decree. It would seem to be manifest, however, that if, under any circumstances, it would be proper to adopt such a rule of damages, it would not be so in this case. The undisputed testimony shows that interest would not compensate the owner for the loss of use between

the time of her capture and the time of the alleged resale. The average net earnings of the boat had been from $300 to $350 a month (*Deus*, p. 2). The date of the resale is not given; but, as the treaty of peace was not signed until eight months after the capture, and the vessel was not resold until after it was discovered that the Cuban markets were not to be reopened to United States fishing vessels, it is improbable that the sale occurred within less than a year after the capture. The loss of use would therefore amount to from $3,600 to $4,000; and, taking into account an allowance for depreciation resulting from the reduction in her size of 10 tons by Mr. Cates, or, say, nearly one-fifth of her value, before capture, it will be seen that the damages, if they had been assessed on this theory, would not have been far different from those which have been awarded.

It should be mentioned, however, that no exception was taken to the commissioner's report on the ground that he did not assess the damages on this theory, nor is there any assignment of error on this point (*Paquete Rec.*, pp. 59, 60, 66). In fact, this point has never been suggested in the case until the argument in this court on this appeal.

The commissioner, following the same rule as in the other cases, found the value of the vessel, at the time of her capture, to have been $9,000, and, adding the value of the fresh fish, interest, and expenses, awarded damages aggregating the sum of $11,737.69 (*Rec.*, p. 10; *Opinion, Paquete Rec.*, pp. 55–58). The report was duly confirmed by the court (*España Rec.*, p. 11).

It is submitted that the report is fully sustained by the evidence, and that no reversible error in regard to it is shown. (See cases *ante*, p. 11.)

9. THE CUATRO DE SETIEMBRE, No. 588.

This vessel was purchased by Leonardo Bunuel in 1896 for $5,000, Spanish gold, in cash. She was a vessel of 33 tons gross, 31 tons net, and was Cuban built. She had formerly been named the Maria de Madelena, but in consequence of a hurricane in 1888 she was wrecked and nearly destroyed at Mariel, after which she was brought to Havana, extensively repaired, and renamed the Cuatro de Setiembre. Only the usual maintenance repairs had been put upon her since her purchase by Bunuel, less than two years before her capture. Since Bunuel had owned the vessel her net earnings on his share of the catch had been between $5,000 and $6,000 (*Casteleiro*, pp. 2, 3).

JUAN LLURIA, ship-builder and harbor master of Havana, stated that in accordance with his duty he had inspected, examined, and valued the vessel, and that on March 1, 1898, she was worth $5,000, Spanish gold. His appraisement was based upon the condition of the vessel and his inspection of her and her repairs. He annexes a certificate stating that the body, rigging, tackle, apparel, and furniture of the vessel were all complete and in good condition (p. 4).

GANDON and SUAREZ testify as to the value of the fresh fish, as in the other cases (pp. 5, 6).

Mr. HORR, the first witness examined for the Government, after stating that he had not had any experience with this class of vessels (p. 7), and that any estimate he would give of her "I hardly think * * * will be a reliable estimate" (p. 8), first expressed, over the claimants' objection, the opinion that she was worth $1,000 (p. 7), and on that opinion being excluded by the commissioner (p. 8) raised his estimate to $2,500, adding, "I don't recollect the exact condition of this boat" (p. 8). The witness did not pretend to possess any qualifications which would have justified the expression of an opinion on his part, and what he did say on the subject related to values in Key West. As to Mr. Horr's qualifications generally, see *ante*, p. 9.

Mr. LOWE testified that he purchased this vessel at the marshal's sale for $450, and resold her to parties in Havana for $1,500 (pp. 9, 10). He does not state the time of the sale, nor the parties to whom he sold. He purchased the vessel on speculation, and sold her when he found that no change was contemplated in the Cuban regulations in regard to fishing, and accordingly that the vessel could not be profitably employed in that business from Key West (*Paquete Rec.*, p. 47). Mr. Lowe expressed no opinion as to the value of the vessel in Cuba.

The commissioner reported the value of the vessel when

captured as $5,000, and, adding the value of her fresh fish, interest, and expenses, made a total award to the claimant of $7,285.75 (p. 11; *Opinion, Paquete Rec.*, pp. 55–58). The report was duly confirmed (*Cuatro de Setiembre Rec.*, p. 12).

It is submitted that the report is justified by the proofs, and that no reversible error in regard to it has been shown. (See cases *ante*, p. 11).

10. THE SANTIAGO APOSTOL, No. 589.

This vessel was built by Cæsar de la Torre, at Mariel, in 1890. The owner paid in cash for all the labor and material as it progressed, and then presented accounts therefor, with an official certificate of her measurement and value, for registry at the office of the captain of the port, in accordance with the laws then in force, and thereupon the vessel was officially appraised at $9,980, Spanish gold. Other items of expense put upon the vessel somewhat increased her value at the time of her construction. In September, 1894, repairs to the extent of $1,200 were made upon her at the ship yard of Ceferino Miranda. Again, in 1897, other repairs were made upon her, including a new bowsprit, repairs to the bow, new blocks, windlass, &c., which cost $1,300. The latter repairs were made at the same place. Her value at the time of capture is stated by the owner to have been about $10,000 (*Torre*, pp. 2–3). The net tonnage of the vessel is stated in one

part of the record as 90 tons (*Torre*, p. 2), and in other parts as 70 tons (*Supplemental Stipulation as to Facts*, p. 3).

JUAN LLURIA stated that he had inspected, examined, and valued the vessel on March 1, 1898, at the sum of $10,000, Spanish gold, basing his appraisement upon the special condition of the vessel and upon an inspection of her. He appends his certificate, in which he states that the body, rigging, tackle, apparel, and furniture of the vessel were all complete and in good condition at that time (pp. 4, 5).

Mr. HORR testified, subject to objection, that he considered the value of this vessel in Key West to have been about $5,000, but the objection to his testimony was subsequently sustained. With reference to Mr. Horr's qualifications, see *ante*, p. 9. He expressed no opinion of the value of the vessel in Cuba.

Mr. ATCHINSON, deputy marshal, purchased the vessel at marshal's sale for $2,700, and subsequently sold her to parties in Havana for $4,000. He does not state when or to whom the sale was made. He thought that if the Cuban markets had been opened to the vessel she would have been worth in Key West about $3,500. This witness was obviously without any qualifications which entitled him to express an opinion as to the value of the vessel (p. 10). He did not assume to express any opinion as to her value in Cuba.

The commissioner reported the value of the vessel, when

captured, as $10,000, and, adding the value of her fresh fish, interest, and expenses, awarded the sum of $11,632.74 (p. 10). His report was duly confirmed by the court (*8 Apostol Rec.*, p. 11).

It is submitted that the report is sustained by the evidence, and that no reversible error in regard to it has been shown. (See cases *ante*, p. 11.)

It may be permissible to remark, further, in conclusion, that the boats, though varying somewhat in size and tonnage, were all of the usual class of coast fishing vessels employed in the littoral waters of the Gulf. They are such boats and of such sizes as our own subjects had built and employed there, so long as it was profitable to do so. Many of the boats indeed were of American origin. Those which had been built in Cuba did not differ materially from the others, either in type or size. They are all expensive to build, presumably because of their peculiar construction. But those which had been built in Cuba do not appear to have cost much, if any, more than they would have cost if built in Key West. All had been well maintained; and even Mr. Horr concedes that an old boat may be kept up so as to be "as good as new" (*Paquete Record*, p. 39). Whether they were as good as new or not, need not be argued or determined. The claimants rest on the proposition that they were good enough to be worth the amounts of the awards, and the libelant has made no serious effort to show the contrary.

In view of the humane attitude of our Government in advocating the abolition altogether of the right to capture private commercial property at sea in time of war (3 *Wharton's Int. Law Digest*, § 342, pp. 260–263), it would seem that technical rules limiting the amount of compensation to be made for captures without probable cause should not be applied with any unnecessary rigor.

11. THE DECREES IN THE CASES ABOVE ENTITLED (Nos. 581–589) SHOULD BE AFFIRMED WITH COSTS.

Respectfully submitted.

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WASHINGTON, March 20, 1903.